IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1298

LAWRENCE S. KRAIN,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, a corporation;

CHARLES YOUNG, individually and as Chancellor of the University of California at Los Angeles;

SHERMAN M. MELLINKOFF, individually and as Dean of the University of California at Los Angeles School of Medicine;

DAVID H. SOLOMON, individually and as Chairman of the Department of Medicine of the University of California at Los Angeles School of Medicine;

RONALD M. REISNER, individually and as Chairman of the Division of Dermatology of the University of California at Los Angeles Medical Center,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner Lawrence S. Krain respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 19, 1977.

OPINION BELOW

The Memorandum Opinion of the Court of Appeals, for non-publication, appears in the Appendix hereto. It is understood

that no opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 19, 1977. This petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Where jurisdiction of the federal district court exists because of claims under the Civil Rights Act (42 U.S.C.A. § 1983) diversity of citizenship and other federal bases, can a district court, where there is no compelling reason for refusing to accept jurisdiction, properly enter a judgment of abstention on the basic ground that a state court action covering some of the same subject matter has previously been filed?

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked on several bases. One was diversity of citizenship, with the petitioner being a citizen of Illinois and the individual respondents being citizens of California, with the corporate defendant being a California corporation.

Federal jurisdiction was based also upon the Federal Civil Rights Act and upon the Family Educational Rights and Privacy Act of 1974.

The present action was filed on July 1, 1975, in the United States District Court for the Central District of California by petitioner against the Regents of the University of California and individuals connected with that university. There were six counts for (1) declaratory judgment; (2) denial of Civil Rights; (3) taking of property without due process; (4) denial of equal protection; violations of Family Educational Rights and Privacy Act of 1974. A year earlier, on July 1, 1974, petitioner had filed an action against respondents in the Superior Court of the

State of California for the County of Los Angeles, for breach of contract, injunctive relief, and denial of constitutional rights.

However, the state action did not have causes of action for the denial of civil rights, violations of the Family Educational Rights and Privacy Act of 1974, declaratory relief, or violations of rights occurring after July 1, 1974.

A preliminary injunction was denied in the state action on July 26, 1974. The action itself has not gone to trial.

After an informal hearing in the present case on July 2, 1975 before Honorable Warren J. Ferguson, United States District Judge, Judge Ferguson declined to take jurisdiction and entered a Judgment of Abstention under Younger v. Harris, 401 U.S. 37 (1971) and Hicks v. Miranda, 422 U.S. 332 (1975).

Petitioner is a medical doctor. Petitioner received and accepted an appointment as a resident in the field of dermatology at the University of California at Los Angeles School of Medicine. The residency

was a three year program; petitioner satisfactorily completed two years of residency, but was not renewed for the third year. Petitioner accepted a fellowship at Harvard Medical School - Massachusetts General Hospital, but was later dismissed therefrom, allegedly because of unfavorable recommendations by respondents. Petitioner sought but was denied readmission at U.C.L.A. to its residence program.

Count Two of the federal complaint alleges a cause of action under the Federal Civil Rights Act, 42 U.S.C.A. § 1983, which of course is not available in the state courts. This cause of action alleges importantly inter alia that the administrative procedure under which petitioner was terminated from his medical residency violated the rights of petitioner under the Civil Rights Act in specific respects. These, generically, relate to denials to petitioner of the right of due process, including but not limited to various deprivations of both notice and the opportunity to be fairly heard.

There is a count under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232(g). Naturally, this is a federal matter not cognizable in the state courts; and there was no comparable count in the state court action. The Act is very new, and it does not appear that there are yet any private suits thereunder. Petitioner urges that under the law there is room for private suits. That is a question which, as yet undecided, would be very appropriate for determination by this Court at this time.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IN THIS CASE IN THE LOWER COURTS ENCOURAGING BROAD EXERCISE OF ABSTENTION BY FEDERAL COURTS CONFLICTS WITH THE VIEW OF THE QUESTION TAKEN BY THE SEVENTH CIRCUIT, WHICH IS BEING REVIEWED BY THIS COURT.

The lower courts have in this present case taken the view that abstention by a federal court is amply justified in situations where significant overlap between the claims presented in the federal action

and claims in a state court action between the same or similar parties.

But such view is by no means universal in the federal courts, and is not consonant with the general principles governing in this field.

Thus, in the case of Calvert Fire Insurance Company v. Will, 560 F.2d 792 (CA-7 [1977]), the Court of Appeals for the Seventh Circuit granted a writ of mandamus to require the United States District Court for the Northern District of Illinois to adjudicate a federal claim for damages and equitable relief under the Securities and Exchange Act of 1934. The case had been stayed by the district court in deference to state court proceedings.

This Court has granted, on January 8, 1978, certiorari to review that decision. The number of that case in this Court is 77-693.

Thus there appears to be a conflict between the Courts of Appeals with regard to this significant question of federal jurisdiction. This conflict requires to be, and is in the process of being, determined

by this Honorable Court.

We amplify briefly. Specifically, the Seventh Circuit, in the case of Calvert Fire Insurance Company v. Will, 560 F.2d 792, has interpreted the Colorado River Case to mean that, where there is contemporaneous exercise of concurrent jurisdiction by a state court and a federal court, "....the pendency of a state court action is not a bar to an action in a federal court involving the same issues." (Page 795).

Holding that "the district court should not have deferred to the state court on grounds of federalism in light of Colorado River...." (Page 797), the Seventh Circuit granted a writ of mandate against the district court requiring it to proceed with adjudication of the federal claims.

On the other hand, the Ninth Circuit in the instant case has given a very different interpretation to the Colorado River case, and employed it as a specific authority (and the only Supreme Court authority) for upholding the district

court judgment of abstention because of the pendency of a like and concurrent state proceeding. (See slip opinion reproduced in the Appendix hereto).

Clearly there is a substantial degree of conflict between the views of the Ninth Circuit and those of the Seventh Circuit with respect to the important question here involved. And, as indicated, this Court has already granted certiorari to review the judgment of the Seventh Circuit in Calvert. This conflict, and the existing grant of certiorari in Calvert, strongly justify the granting of certiorari in the instant case as well. This Court might well wish to have the two matters argued together; alternatively, after granting certiorari the Court might wish to delay determination of the present case until Calvert is finally determined.

II. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE COLORADO RIVER CASE, AND OTHER CASES IN THIS COURT, THAT STRONG AND WELL-ACCEPTED REASONS MUST EXIST TO JUSTIFY ABSTENTION OF A FEDERAL DISTRICT COURT.

The federal rule and the rule enunciated by this Court is that where jurisdiction of a federal district court exists, it must be exercised on cases brought before it unless well-defined countervailing reasons exist. That rule seems not to have been observed appropriately by the lower courts in the present case; the judgment of abstention was not based upon any important countervailing reason for refusing to decide the matter in the federal courts.

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), is in rather sharp conflict with

the judgment of abstention in the present case.

In Colorado River, it is true that the holding of this Court in light of a pending state action covering the same subject matter, actually affirmed a dismissal of the federal action to obtain a determination of rights in waters located in Colorado Water District No. 7. However, this was regarded by the Court as an unusual situation, wherein specific federal legislation had given consent to such controversies involving federal water rights, and wherein there were other special circumstances including extensive involvement of state water rights, and the 300-mile distance between the District Court in Denver and the state court in Division 7.

Very importantly, this Court in Colorado River carefully reviewed and

specifically held inapplicable the doctrine of abstention, in any of its three general categories:

(a) In cases presenting a federal constitutional question which might be mooted or differently presented through state court determination of state law;

(b) In cases presenting difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result of the case.

(c) In cases where generally, federal jurisdiction is invoked to restrain state criminal proceedings; or certain restraining state nuisance proceedings with regard to obscene film theaters; or restraining collection of state taxes.

Even while upholding the federal court dismissal, the majority opinion in Colorado River emphasized "... that we do not overlook the heavy obligation to exercise jurisdiction." (Page 821), and stressed the federal legislative policy specifically providing the state courts with jurisdiction in such water rights cases.

In the instant case, however, the matter does not appear to fit within the three general categories for abstention set out in Colorado River. Neither are there present any exigent factors (such as federal legislation pushing forward state jurisdiction in the matter). Rather, the present case would appear to be a case wherein the exercise of federal jurisdiction appears appropriate and is in no significant way contraindicated by any federal judicial or legislative policy considerations.

This Court in Colorado River, in the majority opinion of Mr. Justice Brennan, pointed out that lower court abstention from the exercise of federal jurisdiction is the exception and not the rule (Page 813). The opinion goes on to quote from County of Alleghany v. Frank Mashuda Co. 360 U.S. 185, 188-189 (1959):

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception

to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest."

In the present case it appears that federal question jurisdiction exists, and that in any event diversity of citizenship jurisdiction also exists. Even if the federal question jurisdiction did not exist, it would appear that abstention was not justified; for diversity of citizenship jurisdiction also existed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,
LAWRENCE WILLIAM STEINBERG
Counsel for Petitioner

APPENDIX

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAWRENCE S. KRAIN, *Plaintiff-Appellant,* vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA, a corporation; CHARLES YOUNG, individually and as Chancellor of the University of California at Los Angeles; SHERMAN M. MELLINKOFF, individually and as Dean of the University of California at Los Angeles School of Medicine; DAVID H. SOLOMON, individually and as Chairman of the Department of Medicine of the University of California at Los Angeles School of Medicine; RONALD M. REISNER, individually and as Chairman of the Division of Dermatology at the University of California at Los Angeles Medical Center, *Defendants-Appellees.*	No. 75-2853 MEMORANDUM

[December 19, 1977]

Appeal from the United States District Court
for the Central District of California

Before: TRASK and GOODWIN, Circuit Judges, and SOLOMON,* District Judge.

Lawrence S. Krain appeals from a judgment of abstention entered by the District Court. We affirm.

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Krain received an appointment as a resident at the University of California at Los Angeles School of Medicine (U.C.L.A.) for one year followed by an appointment for a second year; but he was not offered an appointment for a third year. Krain, with certificates of satisfactory completion of two years of residency from U.C.L.A., accepted a fellowship at Massachusetts General Hospital, but was later dismissed from this program.

Krain returned to California and filed a formal complaint with U.C.L.A. After extensive hearings in March and April 1974, a three-member hearing committee denied his application to be reinstated as a third year resident.

Krain filed an action in the Superior Court of Los Angeles on July 1, 1974. On a number of legal theories, Krain complained of acts leading up to his departures from U.C.L.A. and Massachusetts General Hospital and to U.C.L.A.'s refusal to reinstate him. The state court denied Krain's application for a preliminary injunction on July 26, 1974, and Krain appealed from the denial of this motion. On March 19, 1975, he filed a certificate of readiness for trial in the Superior Court.

On July 1, 1975, Krain filed this action.

The state and federal causes of action are substantially the same, and the parties are identical. What plaintiff calls a libel in his state court complaint, he calls a violation of his civil rights under 42 U.S.C. § 1983 in his federal complaint. In the only different cause of action in the federal complaint, Krain alleges a violation of the Family Educational and Privacy Rights Act of 1974, 20 U.S.C. § 1232g. Neither the language of the relevant section, 20 U.S.C. § 1232g(b)(1), nor the Act's legislative history, S.REP.No. 93-1206, 93rd Cong., 2nd Sess., *reprinted in* (1974) U.S. CODE CONG. & AD. NEWS 4206, 4250, support appellant's contention that the Act provides a private cause of action.

Because the concurrent state and federal proceedings involve identical parties and substantially similar claims and because Krain elected to file in the state court first, it was proper for the District Court to enter a judgment of abstention. *Weiner v. Shearson, Hammill & Co., Inc.*, 521 F.2d 817 (9th Cir. 1975). The Court in *Weiner* gave as its reasons for approving abstention:

> ". . . the friction created by the appearance that the second court is interfering with the first; the waste of judicial resources caused by litigation in two courts; the unnecessary burden placed on already overcrowded dockets; the dual burden placed on litigants; and the possibility that dual litigation might involve the courts in an unseemly race to judgment . . . ." 521 F.2d at 820.

The pendency of a concurrent state proceeding will not justify abstention in all cases. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). But where the parties and claims in the concurrent state and federal cases are nearly identical, federalism, equitable principles and considerations of wise administration justify abstention. This is particularly true where, as here, the plaintiff in the federal case first chose the state forum and there have been no extensive proceedings in the federal forum. *Colorado River Water Conservation District v. United States, supra* at 817, 820; *Weiner v. Shearson, Hammill & Co., Inc., supra* at 819-21.

The District Court was justified in entering a judgment of abstention, which judgment does not affect the merits of Krain's claims.

Affirmed.

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